Supreme Court, U.S.
FILED

No. (1)

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In The
# Supreme Court of the United States

**HAYWOOD A. CANNON,**

*Petitioner,*

v.

**LEWIS H. SWINDELL, IV; NORMAN EDWARD WIGGINS – individually and in his capacity as administrator; MARVIN EUGENE WIGGINS,**

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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## Petition for Writ of Certiorari

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## QUESTIONS PRESENTED

1. Are the defendants entitled to a dismissal at this pleading stage of a pro se civil rights complaint, not having answered and filing a memorandum supporting their motion to dismiss months later after prompting by the magistrate assigned to the case?

2. Have the Federal District and Fourth Circuit Courts in effect, reflecting a pattern; enacted a JUDICIAL REPEAL of the civil rights statutes involved contrary to the scheme and intent of the Congress and decisions of this Court and in so doing violated the "SEPERATION OF POWERS" encroaching on the legislative branch and exceeding the judicial authority granted under the U.S. Constitution?

3. Has the Fourth Circuit ignored previous decisions and instructions from this U.S. Supreme Court such as Lugar v Edmundson Oil Co. and cases therein, reflecting a pattern foreclosing relief in pro se civil rights claims suggesting grounds for this Court to exercise its supervisory authority?

4. Did Judge Britt overstep his authority when he ordered this pro se plaintiff to not sue anymore state judges in contradiction to Judge Fox's order which dismissed without prejudice a preceding case involving similar but additional claims and circumstances; the difference being that the case to Judge Fox was against two state judges and the instant case was against a lawyer, administrator and his brother who were alleged to have conspired with state judges and others to deprive petitioner of federally protected rights, equal protection, due process and impede, hinder and obstruct the orderly

administration of justice in state and federal courts with animus due to the religious activities, beliefs, and affiliation of petitioner?

5. Has the Fourth Circuit denied petitioner due process with regard to both appeals therein, one under Judge Fox, the other under Judge Britt, whereby the use of un-published opinions that do not address the merits or contentions made by petitioner have the effect of denying him a meaningful appeal in a pair of pro se civil rights claims that have a criminal equivalent and involving statutes that have been granted priority by Congress and by the Fourth Circuit's own standards (Terry v Bobb 827 FS 366-EDVa.1993) require a solicitous approach to pro se civil rights claims in clear contradiction to this Court's own mandate in cases such as Haynes v Kerner (92 S Ct 594-1972), Johnson v Avery 89 S Ct 747 and Cruz v Beto 92 S Ct 1079 (1972)?

6. In affirming the federal district court's orders in both these pro se civil rights cases has the Fourth Circuit departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by a lower court so as to call for the exercise of this U.S. Supreme Courts' supervisory power by using the Rooker-Feldman Doctrine wrongfully, by refusing to accept claims relating to the liability of a state judge who acted outside the geographic bounds of his office as condemned by the Second Circuit in Maestri v. Jutkofsky 860 F2d 50 (2nd Cir. 1988) as being true at the pleading stage where under the facts alleged any relief may be due, and by disregarding Rankin v Howard 633 F2d 844 (1980) and Dennis v Sparks 101 S Ct 183; Adickes v. S.H. Kress and Co. 90 S Ct 1605; United Sates v Price 86 S

CT 1152,1156; Monroe v. Pape 81 S Ct 473,476; Mitchum v. Foster 92 S Ct 2151, 2161(1972); Ex Parte Virginia 100 U.S. 339 (1880) and other Supreme Court cases dictating the expressed will of the Congress and this Court?

7. If Stump v Sparkman is "good law" then why was it not recited in Butz v Economou; decided three months later and with regard to judicial immunity and the "clear absence of jurisdiction" standard, this court has stated as in Mullinane Central Hanover Bank that absence of due process often deprive's a court of jurisdiction and thus could it be that it would be an appropriate time to establish a clearer standard in this area of law, including reconsideration of Pierson v Ray which was decided against a backdrop of pro se prisoner claims and not against the intent of the Congress as it stood in 1866 and 1871, when the civil rights statutes now codified as 42 USC 1983 and 1985 (2),(3) were passed? Note IMMUNITY OF STATE JUDGES UNDER THE FEDERAL CIVIL RIGHTS ACTS: PIERSON V RAY RECONSIDERED-Northwestern University Law Review Vol. 65, No. 4 September-October, 1970 pages 615-640; LIABILITY OF JUDICIAL OFFICERS UNDER SECTION 1983-Yale Law Journal Vol. 79: 322, 1969; STUMP V SPARKMAN: THE DOCTRINE OF JUDICIAL IMPUNITY: Virginia Law Review Vol. 64 October 1978 Number 6 pages 779-858.

8. If the Federal Circuit Courts are recognizing the concept of "religious animus" under certain provisions of 42 USC 1985 then is it not cognizable to do the same under other statutes such as 1981 and 1982, particularly since federal law forbids religious discrimination?

9. Is there an animus requirement for attending federal court under 1985(2) and if not; has the petitioner wrongfully been deprived of a valid claim thereof for having "attended court" by filing a series of civil rights claims including #02-1077 and #10-2214 and in retrospect as far back as CA No. 85-61-CIV-4, Cannon v. Exum and as otherwise footnoted in the Fox order? (See Appendix F)

10. Does petitioner qualify as a member of a class protected under a federal civil rights conspiracy statute and therefore entitled to the protection of 1985(3) and was he deprived of equal protection and due process when the 4th Circuit refused to enforce it's own rulings; Ward v. Conner 657 F2d 45(1981); St. Agnes Hospital v. Riddick 668 F Supp 478 D.Md. (1987) in a pair of pro se civil rights claims wherein petitioner sought protection under religious animus?

11. In allowing these orders to stand, are not others similarly situated, including petitioner; who are forced to litigate pro se and who suffer religious animus being discouraged from "access to the courts" and "to petition the government for a redress of grievances" under the 1st, 5th, and 14th Amendments contrary to the expressed will of Congress and decisions of this Court?

12. Does not the record of five pro se civil rights claims as shown herein filed by petitioner and the manner in which relief has been foreclosed reflect a JUDICIAL REPEAL of 42 US 1983 and 1985(2), (3)?



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## LIST OF PARTIES

The petitioner herein intends to file a motion to consolidate the two civil rights cases which are referenced herein although the later case is of most importance, the two are intertwined and were filed separately due to the fact that the defendants in the earlier case were state judges, one of whom was a defendant in a pair of 1994 cases wherein one case was set for discovery and then abruptly dismissed. Certiorari was sought with this Court back then to no avail and there is even a further history going back to 1985 all of which involve the same civil rights statutes. Being pro se the petitioner got the statutes confused but upon discovery of the jury instructions for 42 USC § 1983 and §1985 it has become ever clearer the importance of them and how they can be applied to private persons and state officials who engage in conduct that invoke entitlement to relief under same and since Congress designed these statutes to enforce the Fourteenth Amendment it is in the public interest that a meaningful avenue of adjudication be made to persons in need of such relief, especially those who are forced to go pro se because they have been unable to get legal assistance due to the power, prestige and machinery of the government possessed by the defendants. Thus the parties to the Fox case are listed here in hopes the Motion to Consolidate will be granted. The parties to the Britt case are listed on the cover sheet and it is the later of the two cases filed.

HAYWOOD ALLEN CANNON
VS
RUSSELL W. DUKE, JR.; LOUIS B. MEYER
#01-2214 FOURTH CIR. CA-00-52-7-F DIST. COURT

HAYWOOD A. CANNON 161 BOOTH LANE-
RICHLANDS, N.C. 28574 910-324-7070

STACI TOLLIVER MEYER-N.C. DEPT. OF JUSTICE
PO BOX-629 RALIEGH, N.C. 27602

Discussion of this case begins on pages 1-20.

The CANNON V SWINDELL case which appears on the cover is discussed at pages 20-29 in the STATEMENT OF THE CASE.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment(s) below.

The opinion(s) of the United States Court of Appeals appears at Appendix pages a-b (02-1077) and n-o (01-2214) and are UNPUBLISHED per curiam.

The opinion(s) of the United States District Court appears at Appendix pages b-l (02-1077) and o-x (01-2214) and are UNPUBLISHED.

The opinions of the Fourth Circuit and of the Federal District Court in the case Cannon v. Duke #01-2214 which is subject to the motion to consolidate and or the exercise of the supervisory power of this court appear in the appendix subsequent to the opinions and orders in Cannon v. Swindell IV et al #02-1077 and appear in the Appendix at pages n-y.

JURISDICTION

This case, #02-1077 from the Fourth Circuit, originated in the United States District Court for the Eastern District of North Carolina-Southern Division No. 7:01-CV-82-BR(1).

The date on which the United States Court of Appeals decided my case was May 6th,2002.

A timely petition for rehearing was denied by the United States Court of Appeals on June 25th,2002,

and a copy of the order denying rehearing appears at Appendix m-n.

The jurisdiction of this court is invoked under 28 USC 1254(1). Supervisory Jurisdiction is sought under Article Three of the U.S. Constitution because a meaningful remedy by appeal has been foreclosed by the action of the Fourth Circuit and an adequate remedy is unavailable. Also, to prevent irreparable mischief and harm, prevent costly delays and unusual burdens of expense and most of all, to achieve justice. There is no other adequate remedy for the violations of the named statutory and constitutional rights. Furthermore, it would be in the public interest and the preservation of constitutional integrity for this court to exercise a review of a concentrated pattern of foreclosing relief mandated by the congress in this area of justice. The decisions of the six federal appellate judges, two federal district judges and the magistrate involved in these two cases is asserted by this petitioner to be contradictory with the other circuits, decisions of this court and wrongful in view of the departure from the designated procedure assigned to this area of law. And the history of petitioner's efforts reflect a consistent pattern of mishandling prior claims and there is more likely than not a record of the same involving others similarly situated depriving them of the effective benefit of 42 U.S.C. 1983 and 1985(2),(3) and the 14th Amendment; effecting to what amounts to a judicial repeal thereof in the Eastern District of North Carolina and the Fourth Circuit U.S. Court of Appeals.



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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

TITLE 42 USC §1983 AND §1985(2),(3)

FIRST, FIFTH, SIXTH, SEVENTH, & FOURTEENTH AMENDMENTS-US CONSTITUTION

SUPREMACY CLAUSE-ARTICLE SIX,CLAUSE TWO

28 USC §1367(a)

28 USC §1331(a) AND 1343(3),(4)

RULES 12 b (1), (2), (6); 8 (a), (f)

## STATEMENT OF THE CASE

This is a petition seeking review of two civil rights claims filed under 42 USC 1983 and 1985(2),(3) by a person forced to proceed pro se. The first claim was filed against two state judges on March 21st, 2000 (7:00-CV-52-F-1) and dismissed primarily on absolute immunity grounds, September 7th, 2000. A motion for reconsideration was filed and about one year later it was denied, August 27th, 2001. Petitioner appealed, #01-2214 to the Fourth Circuit and the judgment was affirmed March 4th, 2002 a petition for rehearing with suggestion for rehearing en banc was timely filed on March 14th, 2002 and same was denied on April 22nd, 2002. The Unpublished Opinion did not address any contentions of law asserted by the pro se petitioner and it is herein asserted that such was not a meaningful appeal and such denies him due process. The two exceptions to absolute immunity were clearly established by case

law in that the state judge going out of his assigned district was in the clear absence of jurisdiction and forming a private prior agreement to rule in favor of one party, along with other conduct; were not judicial functions. Cases like Rankin v Howard and Maestri v Jutkofsky were ignored and every reasonable inference was not accorded this pro se petitioner. To dismiss at the pleading stage without requiring an answer is fundamentally out of line with normal procedure and not in keeping with FRCP rule 8(a) and (f) requiring pleadings be construed so as to do substantial justice or in keeping with decisions of this court such as Haines v Kerner;Johnson v Avery and Cruz v Beto (which state that a pro se complaint must be read in a liberal fashion and must be accepted as true in testing efficiency) or the Fourth Circuit's own case law dealing with pro se civil rights claims. See Canty v City of Richmond Virginia Police Department. A substantial case was made by petitioner to the effect that the state judge was not entitled to absolute immunity and that he was a repeat offender having been sued in 1994 under the same statutes for similar conduct with other lawyers and private persons. The district court used distorted arguments to foreclose any relief such as Rooker-Feldman Doctrine and arguments to the effect it could not review state court proceedings and orders which was a distortion of the nature of the claims. It is not unusual for civil rights claims to arise out of wrong-doing in state court proceedings as demonstrated in Lugar v Edmondson Oil Co.-102 S Ct 2744, a case in which this highest court reproved the Fourth Circuit for misreading Flagg Brothers Inc. v Brooks 98 S Ct 1729 and failing to give sufficient weight to a line of cases, beginning with Snaidach v Family Finance Corp. 89 S Ct 1820; Lynch v Household Finance 92 SCt 113,

118 and including Fuentes v Shevin 92 S Ct 1983. Overt acts and joint participation were clearly alleged in both the claims filed by petitioner and arose in and out of conduct relative to state court actions. Both cases filed by petitioner essentially involved the same acts, facts and circumstances and during the adjudication of the claims other acts were perpetrated that amount to further allegations not cited in the first complaint but which were cited in the second suit against the lawyer-administrator defendants. The petitioner simply went into detail about the factual circumstances of the state court proceedings some of which were bogus and the court exploited his sincere efforts to be clear and factual. It is petitioner's unwavering contention that the complaint against the state judge, Russell W. Duke is a valid one. The other state judge deceased and petitioner did not pursue the technicality of making his widow a real party in interest as a gesture of good will. Petitioner offered to settle the claims to no avail. That suit addressed the two men as individuals and not in their official capacity and they were only able to come into a state courthouse where they were void of power because they were colored with official authority. This circumstance was distorted by the district courts and Dennis v Sparks shows how even if these men were judges those who jointly participated are liable. A lawyer who participates in a bad court paper loses all claim of privilege a principle set out on the Queen's Bench many years ago, (Green v Elgie 5 QB 99). Nonetheless, petitioner's claims were foreclosed using Rooker-Feldman Doctrine which "teaches that federal courts have no subject matter jurisdiction to entertain federal constitutional claims that are "inextricably intertwined" with a state court's ruling in an earlier action, when their adjudication would

be tantamount to a "review" of the state court decision. See 103 S Ct 1303. Petitioner insists that such is not the case in this matter and that the N.C. Supreme Court decisions cited (515P99 and 527P00) were used to demonstrate the "clear absence of jurisdiction" and other matters relative to the federal claims including the unlawfulness of the incarceration which took place after the first complaint was written and filed. It was in the state court proceedings in and out of the state courthouse where the alleged misconduct took place. Both the Fox and the Britt court exploited petitioner's pro se effort at being detailed and factual and purposefully entangled the separate issues that had arose in the state court proceedings so as to have an excuse to foreclose a civil rights-fourteenth amendment claim with a twenty year history. The MM&R allowed the defendants (Swindell) to file a voluminous memorandum of state court papers which were irrelevant and together they have made it appear these federal claims were an attempt to review the correctness of state courts or that the federal claims were intertwined which is not the case. The true nature of the matter has been twisted and distorted so as to foreclose a meritorious civil rights claim. When in fact a series of events that go back to 1985 but more particularly 1994-96 in relation to defendant Duke reveal a massive deprivation of civil rights and 14th amendment deprivations beginning with a domestic situation with petitioner's first wife and involving his child whom petitioner has been deprived of a relationship with for over twenty years! Formal expressions of state law existing in the form of child custody orders made findings of fact as to petitioner's religious affiliation and two beliefs thereof in a civil matter wherein a person who had testified in the proceeding engaged in an ex-parte

communication with the state judge just prior to the issuance of the oral order. The footnotes at the bottom of the Fox order cite a civil rights claim filed in about 1985 and it was in that case that this long series of efforts to gain protection and relief under these statutes began. The petitioner was tried on defective counterclaims, his lawyer was not allowed to help him at trial and an entry of default which was entered when the lawyer took the case after the complaint was filed pro se was allowed to stand foreclosing any relief. The next effort was 1994 against four persons in two separate claims. Although Duke's name does not appear in the footnote (Appendix-F page p) he was a defendant in the Haigwood case. And now we have these two claims. That totals five civil rights claims that however inartfully pleaded are all connected and the other cases listed in the footnote are cases sought to be removed from state to federal court under the removal statute, a bankruptcy appeal or other effort. If the complaints aforementioned beginning with Cannon v Exum; Cannon v Miller et al; Cannon v Haigwood et al; Cannon v Duke et al; and finally Cannon v Swindell IV et al are examined it can be shown a connective thread. It is a most blatant, arbitrary, oppressive and repetitious set of civil rights violations to ever have been put down on paper and petitioner insists his claims have been wrongfully derailed and that he can prove his case. In these and the present case the question was whether certain actions, both private and official taken under color of law, during the course of those proceedings in and outside the state courthouse may have involved a violation of petitioner's federal constitutional rights for which the responsible party may be held liable for damages. The conceptual distinction could not be more clear. The state judges

were sued as individuals because in appearing outside the geographic boundaries to which they were assigned they overstepped clear bright lines of authority.

The petitioner in Swindell et al 7:01-CV-82-BR1 filed a Fraudulent Conveyance Claim Pursuant to FRCP 18 (a), (b) which referenced the Uniform Fraudulent Transfer Act GS 39-23.1 to 39-23.12 as a Third Party Plaintiff Claim as Administrator prior to the Magistrate's order prompting defendant-respondents to file their memorandum on motion to dismiss and sought supplementary jurisdiction under United Mine Workers v Gibbs in an effort to get the court to take the entire controversy. Said filing had exhibits attached thereto, namely the N.C. Supreme Court Orders which were in effect declaratory decrees as was the superior court order granting petitioner a jury trial at a specific place and time and before a specific judge other than Judge Duke. It was however the district court that entangled those separate state matters in a way so as to form an excuse to foreclose any relief and such is unconscionable. And with regard to the absolute immunity issue petitioner submits that the official seeking such bears the burden of showing that it is justified. (See Burns 111 S Ct 1934,1935 r. col. Citing Forrester v White 108 S Ct 538,542). The two state judges were sued as individuals because both appeared without lawful authorization outside the district and county to which each was assigned. Two other state judges have twice repeated that performance since the suits were filed resulting in two unlawful incarcerations. Finally, the N.C. Supreme Court ordered the petitioner released on a Habeas Petition the second time he was unlawfully incarcerated and it was during those times that ex-parte proceedings were carried on between the

defendant lawyer and a state court clerk in violation of an earlier state clerk's order. These are examples of how petitioner has been deprived of his freedom and notice and due process in the state court proceedings involving his responsibilities as administrator and interests to real and personal property arising at his father's death. The defendant Swindell from the beginning or about 1998, carried on a fraudulent transfer of a part of petitioner's father's land with the NC Dept. of Transportation over valid notices of lis pendens and pending state lawsuits ignoring and later depriving, impeding, hindering and obstructing petitioner's due process and equal protection rights as has been the custom and practice in state courts since the early 1980's. State involvement has been the case since all the way back to 1985 and almost every time petitioner has been in a state court with private persons they have had no problem gaining the unlawful and unconstitutional support from state officials whether they be judges, clerks or otherwise. They have deprived petitioner of real and personal property, at least a legitimate interest in property by the joint participation and repeated acts of these judges appearing outside the geographic bounds of their jurisdiction. The Supreme Court has been solicitous in ensuring that persons not be deprived of property without due process of law. See Fuentes v Shevin, Bell v Burson, Snaidach v Family Finance Corporation and Lynch v Household Finance which stated "...a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other." Aside from the bogus court proceedings by the two defendant state judges outside their geographic boundaries the petitioner was unlawfully incarcerated and during such the

defendant respondents (Swindell) went before a state clerk and had himself appointed a commissioner in the bogus estate so as to give deeds to a corporation, violating another clerk's order in the process. Documents including the two N.C. SUPREME COURT ORDERS 515P99 and 527P00 were attached to the Fraudulent Conveyance Claim as exhibits when it was filed in the federal district court along with a state court clerk's order which defendants violated while they had petitioner unlawfully locked up! The proof is there, these are valid claims, each of them and they should not be foreclosed in this way. Petitioner simply could not enforce his rights in a state court and there is no adequate remedy available. And as shown in White v Forrester 108 S Ct 538, judges are not immune for suits that arise out of conduct that is not judicial. The acts of the defendants when carefully examined are not judicial but were taken under pretense of law and as for the private prior agreement to rule in favor of respondents, such was likewise not a judicial function since a person is entitled to the cold neutrality of a fair and impartial judge. A long line of Supreme Court decisions cited in Forrester show and this court said "...this Court has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court." And such officials "have the burden of showing that such an exemption is justified by overriding considerations of public policy, and the Court has recognized a category of "qualified" immunity that avoids unnecessarily extending the scope of the traditional concept of absolute immunity. See Scheur v Rhodes 94 S Ct 1683; Butz v Economou 98 S Ct 2894; Harlow v Fitzgerald 102 S Ct 2727. Petitioner submits that burden has not been met and the respondents should be made to answer

for their conduct in court, at least require them to answer and allow discovery! And as the Court further stated in Forrester, "immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches." A variety of legal contentions and case law were cited by petitioner in his informal briefs and petitions for rehearing to no avail. The Fourth Circuit simply refused to address them. The Federal District Court relied heavily on Pierson v Ray which was interpreted against a background of pro se prisoner claims and not with regards to the intent of the U.S. Congress who passed the Ku Klux Klan Act of 1866 and 1871 to which §1983 was a small part. Bradley v Fisher, the first Supreme Court decision on absolute immunity was not even on the books when Congress passed these statutes and there was no universal acceptance of the broad English immunity rule in 1871. All legislative history available supports the proposition that Congress intended Section 1983 to cover judges. The general rule is that where a statute has supplanted the common law then the common law is set aside and thus would be overruled with impunity by legislation such as Section 1983. It was stated in Pulliam v Allen at 1981 "...it is for Congress, not this Court, to determine whether and to what extent to abrogate the judiciary's common law immunity. See Pierson v Ray, 386 U.S., at 554." Going further at page 1985 of Pulliam and footnote 7. and quoting The Case of the Marshalsea, 10 Co.Rep. 68b, 76a, 77 Eng.Rep. 1027, 1038 (K.B. 1613) where it is stated "...But when the court has not jurisdiction of the cause, then the whole proceeding is coram non judice, and actions [against the judge] will lie". The want of jurisdiction was plainly alleged in petitioner's complaints, each of them. And as can be gleaned from close research the early English law

was one of liability not immunity, See Feinman & Cohen, Suing Judges: History and Theory, 31 S.C.L.Rev. (1980) 203, 205 notes 13&14, 206 note18, 210, 212 notes 49 & 50, 214 note 145, 221 1st par., 222 notes 111 & 112, 227 note 145, 231 notes 169 & 172, 232, 237, 246 1st par., where in reference to Bradley v Fisher 80 U.S. (13 Wall.) 335 (1872) it is stated "Bradley provided explicit authority for holding liable a superior court judge who acts in absence of jurisdiction.", see also page 252 Calhoun v Little, 106 Ga. 336, 32 S.E. 86 (1889), pages 254, 255 (1st par.), 256-258 notes 327 & 331 citing factors from McAlester v Brown 469 F2d 1280 (5th Cir. 1972); Gregory v Thompson 500 F2d 59 (9th Cir. 1974); Lynch v Johnson 420 F2d 818 (6th Cir. 1970). Following the factors outlined in McAlester v Brown it is submitted that the state judge's actions when carefully scrutinized reflect his acts not to be normal judicial functions, nor was a case or that specific case or any case then pending before him. A court order had specificly placed 97 CVS 2062 before a Judge Hockenberry. And finally the defendant state judge Duke was not authorized to be in the geographic location where the bogus court proceedings took place. See pages 259, 261 1st par. And 276. With regard to torts it is said "Liability must be based upon conduct which is socially unreasonable. The common thread woven into all torts is the idea of unreasonable interference with the interests of others....The tort feasor usually is held liable because he has acted with an unreasonable intention, or because he has departed from a reasonable standard of care. See note 375. Other case law cited therein demonstrates judges were liable prior to the passage of 1983 and so it would not be necessary for the Congresses of 1866 and 1871 to have specificly stated in the statute that judges were immune. In fact

examination of statements during the passage of these laws clearly reflect they viewed both state and federal southern judges as liable, both civil and criminally. Ely v Thompson, 10 Ky. (3 A.K. Marsh.) 70 (1820) "an act outside the justice's jurisdiction would expose him to liability". and Revill v Pettit, 60 Ky. (3 Met.) 314 (1860) "a justice of the peace was sued for assault and false imprisonment for examining and committing a felony defendant without bringing him before a second magistrate as required by statute." See footnotes 172 and 173 S.C.L.R. Vol. 31, 1972. Also, "lack of jurisdiction is fatal to judicial immunity", Burnham v Stevens, 33 N.H. 247 (1856) page 232 S.C.L.R. Thus the loosely worded rules in current case law like Bradley and Stump should be clarified. Applying Tenney v Brandhove, 341 U.S. 367 (1951) "Though superficially appealing, ...ignores at least three significant factors: (1) the wording of the statute-judges act under "color of law", but legislators usually "enact" law; (2) the obvious parallel between state and federal legislators, the latter constitutionally immune from suit for acts done in their legislative capacity; (3) the disparate attitudes of the Radical Republican congresses toward legislative and judicial power." See footnotes 16,17 and 18 in the Yale Law Journal Vol 79 page 324, 1969. Further points of interest are that following the decision in Bradley as was done in Stump is inappropriate because Bradley was not brought under 1983. Ex Parte Virginia did not mention Bradley but it did state a judge would be liable under the statute even if his actions were judicial as the last paragraphs of that decision make so abundantly clear. Thus petitioner submits that although he verily believes his claims to be valid because they fit the noted exceptions, it would be in

the public interest to re-examine this area of law starting with Pierson v Ray. The dissenting opinion in Pierson v Ray, 386U.S., at 558-564 stated that every member of Congress who spoke to the issue assumed that judges would be liable under 1983. Petitioner submits that his cases reflect the exceptions to judicial immunity and that it is in the public interest that no absolute immunity be granted in these matters. Sufficient grounds for neither absolute or qualified immunity has been shown and defendant respondents should be required to answer these civil rights complaints. It is petitioner's firm belief that his complaints are valid and that the state judges sued have acted in the "clear absence of jurisdiction" and have performed functions that normally cannot be construed as judicial functions, particularly the forming of a private prior agreements to come outside geographic boundaries and rule in favor of a lawyer belonging to a law firm who has as one of its members another Superior Court Judge and who has appeared often and successfully before the judge in the initial complaint (01-2214). The Yale Law Journal at note 51 stated that a good cause of action could be stated by alleging the judicial officer was acting entirely without jurisdiction. See Vol. 79: 322,1969 page 331 n. 51 and also, Spires v Bottorf, 317 F 2d 273 (7th Cir. 1963). There has been at least one instance where a state judge has recused himself and then reappeared without proper commission and incarcerated petitioner unlawfully violating the N.C. Supreme Court's ex mero motu declaration of a bogus order entered by one of the original state judges sued, namely Louis B. Meyer. And as stated in Barr v Matteo 360 U.S. 564, 588-589 (1959) "...the way to minimizing the burdens of litigation does not generally lie through the abolition of a right of

redress for an admitted wrong.". And where a trial was fraudulently conducted the complaint was held sufficient , McShane v Moldovan 172 F2d 1016 (6th Cir.) from Williamson v Waugh 160 F. Supp. 72 p. 75. This case is exceptional in that it reflects similar circumstances of petitioner who was fraudulently imprisoned and subjected to fraudulent state court proceedings by a judge who was entirely without jurisdiction, geographicly and otherwise. See item 4 of page 1019 of Moldovan. And on page 1022 it was stated that "Congress gave a right of action sounding in tort to every individual whose federal rights were trespassed upon by any officer acting under pretense of state law." Further along therein , citing Bottone v Lindsley, 10 Cir. 170 F 2d 705, 707 it was conceded that "It is conceivable that persons, either individually or acting in concert might so use the state judicial process as to deprive a person of his property without due process of law, or of equal protection of the laws, yet we are certain that to make out a cause of action under the Civil Rights Statutes, the state court proceedings must have been a complete nullity, with a purpose to deprive a person of his property without due process of law." In petitioner's cases that is what is alleged and the two relevant N.C. Supreme Court decisions referenced herein prove that. The footnote in Moldovan on page 1019 reflects as stated in Bell v Hood, D.C., 71 F. Supp. 813 "that the immunity of the federal government from suit extends to all federal officers and agents acting within the scope of their duties as such; and that whenever a federal officer or agent exceeds his authority, in so doing, he no longer represents the government and hence loses the protection of sovereign immunity from suit." Of course petitioner's case deals with state judges, a lawyer and administrator and not a federal official.

However when the Federal Judge Britt apparently exceeded his authority in ordering petitioner to not sue any more state judges, a case over which he did not have jurisdiction, it would appear he himself would have exceeded his scope of authority since the case he dealt with was the one dealing with the lawyer and administrator; the case against the state judges having been previously ruled on by Federal Judge Fox who dismissed without prejudice and since the dismissal was not on the merits it can be refiled for no actual litigation has taken place. Furthermore, whether a complaint states a cause of action is a question of law which must be decided after and not before the court assumes jurisdiction as held in Bell V Hood, 327 U.S. 678. Both the Federal District Court Orders petitioner attempts to present here appear to reflect the premise that there was no jurisdiction, while in the same breathe asserting that petitioner's complaint failed to state a cause of action. Both Spires v Bottorff and McShane v Moldovan were reversed and remanded demonstrating that petitioner has a valid claim. The court in Moldovan was guided by Screws v United States 325 U.S. 91, at 108 where it was stated in part that punishment by federal authority does not encroach on state authority and "while it is not within the power of the United States to punish for a conspiracy to falsely imprison or murder within a state, nevertheless, if the state action is of a particular character and results in such imprisonment or murder, it is prohibited by the Fourteenth Amendment; and Congress is authorized to afford relief thereunder." The decision in Screws v United States was reaffirmed in United States v Classic, 313 U.S. 299 and although these cases dealt with the criminal counterpart of 42 USC 1983 and 1985, namely 18 USC 241 and 242; the intent of Congress

in 1866 and 1871 when these statutes were passed as the Ku Klux Klan Act were such that state judges were to be held accountable. See page 621 of Vol 65, No. 4 of Northwestern University Law Review and at page 623 it is asserted in that journal that "If the test is one of congressional purpose (as it surely is), no absolute immunity for state judges can be read into 1983. See also footnotes 30 and 31 therein as well as the Yale Law Journal Vol. 79:322, 1969 Liability of Judicial Officers Under Section 1983 which discusses in detail the comments of the congress in 1866 and 1871. The statutes both civil and criminal were viewed by those congresses to reach state judges and their unconstitutional behavior. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law". United States v Classic 313 U.S. at page 326. It appears to be the general consensus that both jurisdiction of the person and the subject matter are conjunctional and that both must be present in order for a court to have jurisdiction, but as clearly demonstrated in Maestri v Jutkofsky, a judge outside the geographic boundaries of his authorized jurisdiction loses his immunity. Granting absolute immunity results in severe and as shown by the history of petitioner's five civil rights claims beginning in 1984, repeated abuse. And as stated by Justice Brennan in Howard v Lyons 360 U.S. 590, "the way to minimizing the burdens of litigation does not generally lie through the abolition of a right of redress for an admitted wrong." The Seventh Circuit in Spires v Bottorff took jurisdiction of a pro se civil rights claim because the result of the ruling effectually precluded petitioner from court just as has been done herein in petitioner's cases. That court followed a high court decision and reversed and

remanded for further proceedings. See Roberts v United States Dist. Court, 339 U.S. 844. It also followed United States ex rel. Morris v Radio Station WENR, 209 F 2d 105 (7th Cir.); Lipscomb v. United States, 301 F 2d 905 (9th Cir. 1962). And where an official actually participates or acquiesces in the violation he would apparently be liable; Bursey v Weatherford 528 F2d 483 4th Cir. 1975. The allegations of a private prior agreement to rule in favor of one party with an order that appears to be bogus and derail a court ordered jury trial before another judge hardly is the kind of conduct that should be protected. The arranging for the other defendant Judge Meyer to appear outside his assigned county was an administrative act, one the defendant judge Duke was not authorized to conduct and for which there is no immunity.It also could be construed as an overt act. The Fourth Circuit refused to even discuss cases like Maestri v Jutkofsky 860 F2d 50 (2nd Cir. 1988) which clearly demonstrated that a "Judge's assumption of authority outside geographic bounds of his office is kind of clear judicial usurpation which cannot be condoned by any grant of judicial immunity." In further consideration of that case it was made clear that a judge acting outside of his jurisdiction was indeed "clear absence of jurisdiction". These matters the Fourth Circuit declined to address. The power asserted by the defendant was a pretended power and all who participated are responsible and subject to suit. Both defendant state judges were entirely devoid of power and the ex mero motu declaration of the N.C. Supreme Court proves that and they did not meet their burden of showing they were entitled to absolute immunity. They acted despite clearly valid statutes and case law expressly depriving them of jurisdiction and in violation of another judge's

court order and they knew that such was the case. See State v Ray 97 N.C.510; Hardison v Jordan 1 N.C. 574 (1803) stating that "a civil action is maintainable against a justice of the peace, acting in his office out of court, either maliciously, oppressively, or corruptly." And finally this Court said in Imbler v Pachtman 96 S Ct 984,989 n.13 "The existence and the extent of any immunity defense depends upon the position occupied by the defendant as well as the motivation of the defendant. Unless the district court is thoroughly familiar with that position, it cannot determine whether the occupant of the position is entitled to absolute immunity without first conducting a hearing...". Petitioner thus seeks the consolidation of this case with the one primarily the subject of this petition and listed on the cover sheet thereof, namely Cannon v Swindell IV. Misuse of power possessed by virtue of state law and exceeding the limits of authority which constitute state action for purpose of the fourteenth amendment are a basis for this claim not addressed in the district court. And petitioner submits the fourth circuit is not giving sufficient weight to the decisions of this court such as United States v Price 86 S Ct 1152; United States v Classic 61 S Ct 1031; Ex Parte Virginia 100 U.S. 339, 346-347 (1880); Mitchum v Foster 92 SCt 2151 and others cited in Lugar v Edmundson which the fourth circuit and district court judges continue to ignore. The fourteenth amendment reaches the state and all its creatures; See West Virginia State Board of Education et al v. Barnette 319 U.S. 624 item 2. As in that case, the decision is made difficult because the issues in these cases involve the court's own and officials who abuse their authority should be made to at least answer for their perceived unlawful acts which reflect a determined will to deprive and injure this

petitioner. If there is any fixed star in our constitutional constellation, it is that no official high or petty be allowed to repeatedly exceed and transcend his authority and at the behest of private persons, especially lawyers. The line drawn by the district and federal appellate court is inconsistent with relevant law, Congress and this Court prompting the exercise of supervisory jurisdiction.

These two cases are difficult to discuss separately, but petitioner turns the Court's attention to the primary case in the petition, namely Cannon v Swindell IV et al; #02-1077 Fourth Circuit, 7:01-CV-82-BR(1). The Fourth Circuit affirmed the dismissal of the district court on May 6, 2002 and a timely filed Petition for Rehearing with Suggestion for Rehearing En Banc was filed on May 18, 2002 see #7001 0320 0001 0435 5999 certified mail receipt which shows the foregoing date the Petition came into the possession of the U.S. Postal Service. A Supplement to the foregoing was filed on May 20, 2002 see #7099 3400 0011 0833 2659 certified mail receipt and likewise such is the date the Supplement went over the counter at the Post Office. The date appearing on the first page of said two documents bear the file marks of May 20th and May 22nd, 2002 respectively. Such could be misleading and the petitioner can supply photocopies of his certified mail receipts with regard to both these pleadings in the Fourth Circuit if necessary. Finally the Fourth Circuit denied the Petition for Rehearing and Rehearing En Banc on June 25th,2002 by Judges Williams, King and Hamilton. The earlier case #01-2214 was denied by Judges Wilkins, Motz and Traxler after the same pattern of pleadings.

Petitioner filed this second complaint on May 2nd, 2001 under similar statutes as the first, the basic difference being that the defendants were not state judges but had acted in concert with and participated in joint actions that had deprived petitioner of federally protected rights under color of law (namely a court ordered jury trial in his state deed's case and the two illegal incarcerations) and in so doing they had impeded, hindered and obstructed the orderly administration of justice in state court; the driving force behind the animus requirement was petitioner's religion, activities and beliefs thereof under 42 USC 1983 and 1985 (2),(3). For having tenaciously sought protection in the Federal District Courts as shown in the footnote in the Fox Order, the petitioner was being incarcerated. Certainly there were other obvious advantages. While the petitioner was conveniently incarcerated the respondents (Swindell et al) went before a state clerk and proceeded to obtain, record and file deed's which were founded on the bogus court order of defendant Judge Meyer in violation of an existing clerk's order continuing such matters until the validity of a second marriage could be determined. Hence petitioner's due process rights were deprived since he was not able to be there and the N.C. Supreme Court decisions prove the incarceration to be unlawful and the orders prepared by Swindell and signed by state Judge Meyer were bogus, he being outside his assigned county. In the memorandum regarding the dismissal in the Fox order seeking reconsideration there was voluminous material submitted to prove animus which petitioner states should have been considered by the magistrate since it appears from the record that he reviewed and relied on the order in the earlier case. If he is going to examine previous filings and previous

orders he should be fair and examine all the relevant material. The later section, 1985(2),(3) reaches both private and official conspiracies and both have a criminal equivalent. One section of the statute does not require proof of animus to invoke the statute and same is made clear in the complaint. The MM&R did not fully address every aspect of the relief sought and if petitioner is entitled to relief on any ground the dismissal is improper. A party is not required to state the jurisdictional basis of his claim with precision. See Austin v Reynolds Metals Company 327 F.Supp. 1145 (1970) items 10 and 11). And according to Dye v Cox 125 F.Supp. 714 items 1-5 it is difficult to see how some degree of jurisdiction is not available under 28 USC 1343. See also States Marine Lines, Inc. v. Shultz, 498 F2d 1146 (4th Cir.) (1974) at 1157 a case which incidently recognizes the cases the 4th Circuit failed to give sufficient weight to in Lugar v Edmundson Oil, see1154. The motion to dismiss simply questions the legal sufficiency of the facts averred to invoke the statute and it can hardly be said when all sequences of events are learned that the conduct of defendants was not purposeful, just as alleged in the complaints. Coincidence piled on coincidence can ultimately constitute sufficient evidence to permit a jury finding of conspiracy. See Murdaugh Volkswagen, Inc. v. First Nat. Bank 639 F.2d 1073 (1981 4th Cir.). From the facts averred the complaint shows joint participation which was interdependent upon knowledge possessed by defendants Swindell and which had to have been known by defendant Duke in order for him to come out of his geographicly assigned jurisdiction. The excerpt from the transcript of May 4th,1998 also avers to communication when defendant Duke said "I heard you were on the calendar". At this point it is helpful to understand the 1994 claims against

defendant Duke. However, it is impractical to discount his appearance outside his lawfully assigned geographic boundary and the specific use of a deputy to bring petitioner from before Judge Hockenberry who had been ordered to conduct the jury trial in the state "deeds case"; up to a courtroom on the fourth floor of Pitt County Courthouse where he proceeded to derail the jury trial and put the state "deed's case" in front of another state judge, thus impeding, hindering and obstructing the orderly administration-of justice in a state court. There were two pending state cases relative to the title to real property. One was filed as heir against the purported second wife of petitioner's father who died. In that case defendant Swindell unlawfully obtained an extension of time from a clerk in order to file and answer when it appeared the plaintiff at that time was not about to file an answer, having been fleeced out of a substantial sum already by defendant Swindell. He has never shown his authorization to represent the plaintiff in that case or in the one before Britt. When her administrator was appointed and petitioner became administrator of his father's estate a more improved complaint was filed and it was the earlier case that was pending on May 4th,1998 and the later case was dismissed by defendant Duke, reflecting a private agreement to rule against petitioner. That is not the only instance of such but these facts certainly show how a conspiracy may "be inferred from the things actually done,". (See Overseas Motors, Inc.v. Imported Motors Ltd., Inc., 375 F Supp 499, 531 (E.D.Mich. 1974) quoted in Murdaugh at 1075 item 2. In the Fox order the court used Gooden v Howard County, 954 F2d 960,969 (4th Cir. 1992) (en banc) as a standard to survive a motion to dismiss. The Gooden case however was misapplied because the court

therein treated the motion to dismiss as one for summary judgment, an apparent purposeful misapplication. The Fox court was quick to exploit this. In the MM&R relative to the Britt order again the case of Hinkle v City of Clarksburg, W.Va. 81 F3d 416 (4th Cir. 1996) was misapplied to petitioner's case because petitioner's case did not involve summary judgment. Petitioner submits that in both these civil rights claims the district court applied a summary judgment standard and case law to a simple motion to dismiss. The burden was wrongly shifted to the petitioner-plaintiff. There have been no hearings nor notices of any hearings and no motions for summary judgment filed in either case. The district courts have seemingly crafted their own ingredients for summary judgment in contradiction to this court's definition thereof. See Anderson v Liberty Lobby, Inc. 106 S Ct 2505, 2510 (1986). In Hafner v Brown 983 F2d 570 (4th Cir. 1992) it is stated in item 6 that acquiescence can amount to a conspiracy under 42 USC 1983. Such acquiescence served as demonstrated in that case in item 4 to demonstrate indirectly an agreement between them. Clearly, the lawyer defendant Swindell acquiesced in the derailing, depriving , hindering, obstructing and impeding the May 4th,1998 per-emptory set, court ordered jury trial and he did so in subsequent state court proceedings some of which were bogus. He also knowingly violated state court orders some of which were likewise bogus. These are not gray areas but clear bright lines transgressed repeatedly by defendants, each of them. Contrary to the MM&R at page 3 there is no allegation in petitioner's complaint that the 1971 deed transaction is or was part of the conspiracy, an example of what appears to be a deliberate misreading of the complaint. Also, the fourteenth amendment claims were not adequately

addressed and to say that they existed only so petitioner could have his state claims tried in a federal court is simply untrue. In Keller v District of Columbia 809 F Supp 432 (EDVa.1993) the fourth circuit denied a motion to dismiss in a 1983 claim and the same should have been done herein. The District Court exploited these suttle nuances of case law and the Rooker-Feldman Doctrine on a pro se civil rights litigant and ignored the albeit inartfully pleaded violations of federally protected rights and grounds for conspiracy. Every detail relative to alleged conspiracy is not cited in the complaints, there is much more evidence of private prior agreements between respondent and state judges. The petitioner submits that the defendant-respondents are not entitled to a dismissal at this pleading stage of the case. Any relief relative to the state court matters was properly sought under 28 USC 1367(a) and supplemental jurisdiction. It was not such an extraordinary thing to do under the circumstances of the case as it stood at that time. The Magistrate assigned to the case prompted the defendants to file a memorandum in support of their motion to dismiss months after it had been filed and petitioner asserts such to be untimely and prejudicial to him. The Fox court mis-applied the law on the motion to dismiss and the MM&R followed his lead. In the Gooden case the 4th Circuit treated motions to dismiss as motions for summary judgment and five circuit judges dissented. See Gooden at page 964, right column, 1st paragraph. A summary judgment says there is no genuine issue of fact and must be used cautiously since it can be used to deprive a person of a jury trial. The Magistrate exploited the alternative grounds for jurisdiction sought under 28 USC 1331(a) and 1343(3),(4) and ignored the broad relief required by 42 USC 1983 and 1985(2),(3)

including Ward v Conner 657 F2d 45, the law in the 4th Circuit regarding religious animus along with other relative amendments including the Supremacy Clause and distorted the claims of petitioner saying the federal claims only existed to have the state claims heard in a federal court which was not true. The Magistrate says the petitioner offered no evidence when there had been no opportunity to offer any evidence! The magistrate refused to even consider the possibility that petitioner had been deprived of federally protected rights and that such was due to joint participation between these defendants and the state judge defendants in the earlier case. Petitioner's allegations must be accepted as true at this stage or at least he be allowed to amend his complaint and it does not appear beyond doubt that he can prove no set of facts in order to support his claim. It is asserted petitioner is being held to a standard more stringent than allowed by not only 4th Circuit decisions, but decisions of this court. See Cruz v Beto 92 S Ct 1079; Terry v Bobb 827 FS 366 EDVa.1993; Haines v Kerner 92 S Ct 594; White v Walsh 649 F2d 560 (1981); White v Bloom 621 F2d 276(1980). Slavin v Curry 574 F2d 1256 (1978) is also a pro se conspiracy claim that supports petitioner's position. The petitioner submits that this is a custom and a practice in the federal district courts in North Carolina and the Fourth Circuit and such effects the availability of relief under these statutes and amendments as provided by congress. As mentioned in Lugar v Edmundson; Lynch v Household Finance Corp. 92 S Ct 113,118, stands for the proposition that congressional intent was broad and intended to enforce the 14th amendment. And as stated therein by this court "the line drawn by the court of appeals (referring to the 4th circuit) is inconsistent with our prior cases and would

substantially undercut the congressional purpose in providing the 1983 cause of action". Petitioner submits that after twenty years the fourth circuit is again ignoring the mandate. The fourth circuit and the district courts seem to intentionally miss the historic purpose of 1983 which was to prevent state officials from using the cloak of authority under state law to violate rights protected against state infringement by the 14th amendment. See Monroe v Pape 81 S Ct 473,476. This court in Lugar made it clear the fourth circuit was not to foreclose such relief! But that is precisely what they are doing and it is petitioner's prayer that this court will grant certiorari or if appropriate mandamus in this case. See footnotes 13 and 19 in Pulliam v Allen 104 S Ct 1790 with regard to Mandamus.

## REASONS FOR GRANTING

The elements for granting certiorari and or mandamus are sufficiently outlined in this pro se petition.

1. The Fourth Circuit US Court of Appeals has let stand or otherwise sanctioned important federal questions in a way that conflicts with relevant decisions of this Court and has transgressed the mandate of the US Congress with regard to Title 42 USC § 1983 and § 1985 (2),(3) and the Fourteenth Amendment as described in the Statement of the Case.

2. And in so doing the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by a lower court, as to call for the exercise of the Court's Supervisory Power.

3. In a variety of ways the Fourth Circuit has allowed the misapplication of absolute immunity, the Rooker-Feldman Doctrine, fundamental rules regarding dismissal, convoluting case law dealing with summary judgment and motions to dismiss and ignoring clear case law from the second circuit which shows a judge outside his geographic boundary is acting in the clear absence of jurisdiction. The appellate court has also convoluted the case law on the requirements for showing a civil conspiracy, stretching the law in such a way as to foreclose valid civil rights claims.

4. Petitioner submits the bulwark against tyranny has been breached in that the judicial branch has usurped the authority of the legislative branch, violating the "Seperation of Powers" in the area of law cited; (381 U.S. 437,443 item 6) reflecting a practice, custom and policy to foreclose valid civil rights claims as demonstrated and exemplified herein.

5. And the Britt order usurps the Fox order in ordering petitioner not to sue any more members of the judiciary when that case did not deal with members of the judiciary as defendants. And the Fox order which did, clearly stated the complaint was dismissed without prejudice and that injunctive relief could be granted against a state judge under § 1983 where a declaratory decree had been violated. It was petitioner's contention that a declaratory decree was violated but to no

avail. And the second circuit in Maestri v Jutkofsky 860 F2d 50 (2nd Cir.1988) had shown a state judge to be in the clear absence of jurisdiction when he issued a warrant outside that geographic boundary. Thus petitioner is left in the impossible situation of two conflicting district court orders affecting his right to petition the government for a redress of grievances. Thus petitioner seeks the protection of a federal civil rights conspiracy statute, 1985 (2), (3). And the issues herein go beyond the particular facts and parties involved and petitioner believes it is important to the public and those similarly situated that relief not be foreclosed as has been done by the 4th circuit and the federal district courts in these cases.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted or in the alternative a Writ of Mandamus (Hall v West 335 F2d 48 (CA 1964)) should issue to vacate the affirming of the Fourth Circuit and order the Federal District Court to proceed with discovery and jury trial as demanded. Also, counsel should be appointed pursuant to § 1915.

Respectively submitted,
September_____,2002
Revised Edition November 7th, 2002

Haywood Allen Cannon

Haywood Allen Cannon Pro Se

APPENDIX-A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-1077

HAYWOOD ALLEN CANNON, Plaintiff-Appellant,

Versus

LEWIS H. SWINDELL, IV; NORMAN EDWARD WIGGINS, Individually and in his capacity as administrator; MARVIN EUGENE WIGGINS, Defendants-Appellees

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. W. Earl Britt, Senior District Judge. (CA-01-82-7-BR)

Submitted: April 25, 2002 Decided: May 6, 2002

Before WILLIAMS AND KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Haywood Allen Cannon, Appellant Pro Se. Lewis H. Swindell, IV Norman Edward Wiggins, Marvin Eugene Wiggins, Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Haywood Allen Cannon appeals the district court's order denying relief on his 42 U.S.C.A. §1983 (West Supp. 2001) complaint. We have reviewed the record and the district court's opinion accepting the magistrate judge's recommendation and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Cannon v. Swindell, No. CA-01-82-7-BR (E.D.N.C. Dec. 17, 2001). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX-B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

FILED
NOV 1 2001
DAVID W. DANIEL,CLERK
US DISTRICT COURT
E. DIST. N.CAROLINA
NO.7:01-CV-82-BR(1)

HAYWOOD A. CANNON, Plaintiff

v.

LEWIS SWINDELL, IV, NORMAN EDWARD WIGGINS, individually and in his capacity as administrator, and MARVIN EUGENE WIGGINS, Defendants.

MEMORANDUM AND RECOMMENDATION

THIS MATTER has been referred to the undersigned magistrate judge for a Memorandum and Recommendation on Defendants' Motion to Dismiss Plaintiff's Complaint. The Parties have submitted memoranda in support of their respective positions, and the Motion is, therefore, ripe for ruling.

I.

STATEMENT OF THE CASE

On May 2,2001, Haywood A. Cannon filed suit in this court against Lewis Swindell IV, Norman Edward Wiggins, individually and in his capacity as administrator, and Marvin Eugene Wiggins for violation of his rights under the First, Fifth, Sixth,

Seventh, Eighth and fourteenth Amendments, under 42 USC §§ 1983 and 1985(2) and (3), and the Supremacy Clause of the United Sates Constitution. (Compl. at 1.) Defendants filed a Motion to Dismiss pursuant to Federal rules of Civil Procedure 12(b)(1), 12(b)(2) and 12(b)(6) on May 29, 2001. The Plaintiff filed his Response to the Motion to Dismiss on July 5, 2001. The Plaintiff has also filed a Request to the Clerk for Entry of Default, a Motion for Injunction Enjoining Further Transfer of Real Property, a Motion for Lewis Swindell, IV to Demonstrate His Authority to Represent the other Defendants, and a Motion to Amend Complaint.

II.

FACTUAL BACKGROUND

The Plaintiff is a frequent litigator in this court.[1] As in the previous lawsuits, the Plaintiff seeks relief from "[t]he State Court System [that] is prejudiced against [him.]" (Compl. At 3.) The facts and circumstances the Plaintiff alleges in this case are identical to those previously alleged in Cannon v. Duke, 7:00-CV-52-F, albeit with different defendants, which was dismissed by the Honorable James C. Fox on September 7, 2000.

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[1] Cannon v. Duke, 7:00-CV-52-F (dismissed Sept. 7,2000); Cannon v. Haigwood, 4:94-CV-110-B (dismissed Dec. 29,1994); Cannon v. Miller,4:94-CV-120-B (dismissed Dec. 20,1994; Cannon v. State of North Carolina, 5:95-HC-675-H (dismissed May 14,1996); Cannon v. North Carolina Dept. of Revenue, 5:99-CV-302-F(appeal of bankruptcy denied July 21,1999); Cannon v. Cannon, 7:96-CV-5(dismissed Jan. 16,1996); Cannon v. Cannon, 7:96-CV-139(dismissed Sept.10,1996); Cannon v. Cannon ,7:96-CV-148 (dismissed Jan. 29,1997); Cannon v. Cannon, 7:97-CV-41-F (dismissed Apr, 29,1997).

The plaintiff argues that he was deprived of real and personal property, that belonged to his father, Mayhew Cannon, who died intestate on September 7,1997.[2] The Plaintiff's biological mother, Shirley Mae Cannon, married his father on April 28,1941, but moved to Florida in April 1958 and filed for divorce there. Mayhew Cannon contested the divorce for lack of jurisdiction by the Florida courts, but the Circuit Court in and for Okaloosa County found that jurisdiction existed and granted the divorce on August 8,1958. The property in question was inherited and obtained by Mayhew Cannon in Pitt County, North Carolina, and Shirley Mae Cannon conveyed by deed all of her right title in the properties to him in 1959. Mayhew Cannon married Gladys Marie Cannon on September 8,1958, and lived with her until his death. On March 10, 1971, Mayhew Cannon conveyed the property in question to himself and his wife, Gladys Marie Cannon, as tenants by the entirety .

As in his previous suit before Judge Fox, the Plaintiff alleges that the Defendants, "engaged in a meeting of the minds and a union of the wills with Judge Duke and others to deprive the [him] of a jury trial" on May 4th,1998, (Compl. at 2), and "to deprive [him] of property vested in him as an heir at the death of his father," (Compl. at 3). The Plaintiff alleges that he is unable to register the property with the tax office, as the people there side with the Defendants, and that his state court cases were unlawfully dismissed. (Compl. at 5.) He also argues that a safe, farm equipment, vehicles and other personal property were removed from his father's home, thereby depriving him of this property without due process of law. (Compl. at 5-6)

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[2] All facts come from the Defendants' Memorandum in Support of their Motion to Dismiss.

Apparently the Plaintiff was incarcerated for approximately 39 days, which he alleges is part of the conspiracy by the Defendants and others to deprive him of his rights. (Compl. at 3-4,8.) Once again, the Plaintiff argues that his father's marriage to Gladys Marie Cannon was bigamous and, therefore, void. (Compl. at 8-9.) Moreover, he argues that the 1971 deed transfer of the property to Mayhew Cannon and Gladys Marie Cannon as tenants by the entirety was void and part of the conspiracy by the Defendants. (Compl. at 8.) The Plaintiff argues that he has been the target of discrimination on the basis of his religion as a Jehovah's Witness. (Compl. at 10-12.)

Based on the aforementioned arguments, the Plaintiff alleges that the Defendants have violated his rights under the Supremacy Clause, the First, Fifth, Sixth, Seventh, Eighth, and Fourteenth amendments, and 42 U.S.C.§§ 1983, 1985 (2) and (3). (Compl. at 1.) He seeks injunctive relief against an entity known as Birdneck Point from destroying any buildings on the land. (Compl. at 16-17.) He seeks equitable and declatory relief in the form of a declaration from this court that the 1971 deed conveyance of the property to Mayhew Cannon and Gladys Marie Cannon as tenants by the entirety be void. Furthermore, the Plaintiff seeks compensatory damages and punitive damages in the amount of one million dollars from each Defendant and consequential and special damages due to the Defendants' "persistent", improper behavior and relentless determination to achieve the objectives of their conspiracy." (Compl. at 19.)

## III.
## ANALYSIS

As the Plaintiff has previously been informed by the Honorable James C. Fox in Cannon v. Duke, 7:00-CV-52-F1, a federal district court may not review the correctness of state court decisions. See Rooker v. Fidelity Trust Co., 263 U.S. 413,416 (1923);Dist. Of Columbia Ct. of Appeals v. Feldman, 460 U.S. 462, 476(1983). To the extent that the Plaintiff seeks this court's declaration that the deed transfer was void, that the marriage between Mayhew Cannon and Gladys Marie Cannon was void and that the state court decisions were decided wrongly, this court has no authority to do so.

The Defendants have moved to dismiss the Plaintiff's claims on the basis of lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), for failure to state a claim upon which relief can be granted under Rule 12(b)(6), and for failure to properly plead under Rule 9(b).

To establish jurisdiction, the Plaintiff relies upon 28 U.S.C. § 1343 (3) and (4) which provides in pertinent part:

(a)The district courts shall have jurisdiction of any civil action authorized by law to be commenced by any person: ...

(3) To redress the deprivation, under color of any of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4)To recover damages or to secure equitable or other relief under any Act of Congress providing for

the protection of civil rights, including the right to vote.

42 U.S.C. § 1343 (3) (4) (2001). The Fourth Circuit has held that: "federal courts are courts of limited jurisdiction and are empowered to act only in those specific instances authorized by Congress. The burden is on the party asserting the jurisdiction of the court to show that jurisdiction does, in fact exist." Goldsmith v. Mayor & City Council of Baltimore, 845F2d61,63-64(4th Cir. 1988) (quoting Bowman v White, 388 F. 2d 756 (4th Cir. 1968)). The Supreme Court has held that in the absence of diversity jurisdiction, the federal question must be substantial and "may be plainly unsubstantial either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy, " Hagans v. Lavine, 415 U.S. 528,537(1974) (citations omitted). in Goldsmith, the Fourth Circuit found that the Plaintiff's complaint failed to raise a substantial federal question and held that "[t]he mere existence of a disputed issue of federal law does not confer federal question jurisdiction." Id. at 64. The Fourth Circuit has further held that:

The doctrine of substantiality is especially important where a wholly frivolous federal claim serves as a pretext to allow a state law issue, the real focus of the claim, to be litigated in the federal system...The Federal courts must, therefore, guard against the litigant who frames a pretextual federal issue soley for the purpose of having a state law claim adjudicated in the federal system.
Davis v. Pak, 856 F2d 648,651 (4th Cir. 1988).

The court finds that the Plaintiff claims of violations of his rights under the Supremacy Clause, the First, Fifth, Sixth, Eighth, and Fourteenth Amendments,and 42 U.S.C.§ § 1983, 1985 (2) and (3) exist only to allow the Plaintiff's state law claims to be heard in federal court. The Plaintiff's offers no evidence to support his First, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendment claims nor his Supremacy Clause claim. In his § 1983 claim, the Plaintiff seeks to have the court relitigate issues already decided in the North Carolina state courts. Moreover, the court notes that the Plaintiff's claims are essentially identical to those litigated in his prior case, Cannon v. Duke, 7:00-CV-52-F1, with different defendants. The Plaintiff also raised his §1985 claim in that case, alleging the same facts as here. Accordingly,this court recommends that the Defendants' Motion to Dismiss be ALLOWED based on lack of subject matter jurisdiction.

The court also notes that the case should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim on which relief can be granted. For purposes of a motion to dismiss pursuant to Rule 12(b)(6), the complaint is construed in the light most favorable to the Plaintiff, and its allegations are taken as true. As the Fourth Circuit stated in Edwards v. City of Goldsboro, 178 F3d 231,244 ( 4th Cir. 1999):

[A] Rule 12(b)(6) motion should only be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief.

The Plaintiff has sued the Defendants alleging deprivation of property without due process and of a

jury trial under 42 U.S.C. § 1983. (Compl. at 7.) Section 1983 states that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

42 U.S.C. § 1983 (2001). The Fourth Circuit has held that "[to] establish a civil conspiracy under § 1983, [Plaintiff] must present evidence that the [Defendants] acted jointly in concert and that some overt act was done in furtherance of a conspiracy which resulted in [Defendants'] deprivation of a constitutional right..." Hinkle v. City of Clarksburg, 81 F.3d 416, 421 (4th Cir. 1996). In addition. The Plaintiff"must come forward with specific circumstantial evidence that each member of the alleged conspiracy shared the same conspiratorial objective." Id. Although the Plaintiff alleges a conspiracy among the Defendants anf others, he provides no specific or even circumstantial evidence to support the court's finding one. Accordingly, this court RECOMMENDS that the Plaintiff's § 1983 claim be DISMISSED.

The Plaintiff also alleges violations of the due process under § 1985(2)&(3) due to the fact that he is a Jehovah's Witness and was discriminated against due to his religion. (Compl. at 10.) To prove a claim under 42 U.S.C. § 1985(3), plaintiff must satisfy five elements:

(1.) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the Plaintiff of the equal enjoyment of rights secured by the law to all, (4) which results in injury to the Plaintiff as (5) a consequence of an overt act committed by the Defendants in connection with the conspiracy.

SIMMONS V. POE, 47 F.3d 1370, 1376 (4th Cir. 1995). The Plaintiff must show that existing facts, not mere conclusory allegations, support the conspiracy and that there is a "'meeting of the minds' by defendant to violate claimant's constitutional rights," Id. At 1376-77.

In addition to the conspiracy, however, the Plaintiff must prove discriminatory motivation. "To meet the requirement of a class-based discriminatory animus, under this section the class must possess the 'discrete, insular and immutable characteristics comparable to those characterizing classes such as race, national origin and sex.'" Buschi v. Kirven, 775 F.2d 1240, 1257 (1985) (quoting Bellamy v. Mason's Stores, Inc, 368 F. Supp. 1025, 1028 (E.D. Va. 1973)). The Supreme Court has questioned whether a §1985(3) claim based on animus other than race should be allowed because the predominant purpose of § 1985(3) was to fight racial animus. See Buschi, 775 F.2d at 1257. Refusing to limit § 1985(3) only to race, however, the Court has allowed claims based on other motivations, as long as there is evidence of animus toward a class of persons"'in unprotected circumstances similar to those of the victims of Klan violence.'" Id. At 1258 (quoting United Bhd. Of Carpenters and Joiners of Am., Local 610, AFL-CIO v. Scott, 463 U.S. 825, 851 (1983)). The Court has

expressly refused to allow § 1985 (3) claims based on conspiracies prompted by economic or commercial animus. See United Bhd., 463 U.S. at 838. Even if this court accepts the Plaintiff's allegations of a conspiracy among the Defendants, the Plaintiff has not alleged a "class-based, invidiously discriminatory animus" motivation. Moreover, this court notes that the plaintiff's pleadings are not sufficient to support a finding by this court of a conspiracy among the Defendants. Accordingly, based upon the foregoing, it is RECOMMENDED that Defendants' Motion to Dismiss as to Plaintiff's claim under 42 U.S.C. § 1985 should be GRANTED, and Plaintiff's claim should be DISMISSED.

V.

CONCLUSION

Accordingly, IT IS RECOMMENDED that the Defendants' Motion to Dismiss be ALLOWED based on subject matter jurisdiction under Rule 12(b)(1) and based on failure to state a claim upon which relief can be granted under Rule 12(b)(6). IT IS FURTHER RECOMMENDED that the Plaintiff's Motion for a Request to Clerk for Entry of Default, Motion for Injunction Enjoining Further Transfer of Real Property, and Motion and Request upon Lewis Swindell IV to Demonstrate his Authority to Represent the Other Defendants should be DISMISSED, that the Plaintiff's Motion to amend Complaint should be denied as futile and that the plaintiff should be enjoined from filing further lawsuits in the United States District Court for the Eastern District of North Carolina without first obtaining leave of the court to proceed.

SO RECOMMENDED this the 31st day of October 2001.

/s/ WILLIAM NORTON MASON
UNITED STATES MAGISTRATE JUDGE

I certify the foregoing to be a true and correct copy of the original.

David W.Daniel, Clerk
United States District Court
Eastern District of North Carolina

By /s/ Beth L. Lee
Deputy Clerk

APPENDIX-C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

FILED
Dec. 17 2001
David W. Daniel
US District Court
E Dist.No.Car.
No. 7:01-CV-82-BR(1)

HAYWOOD A. CANNON,
Plaintiff

v. ORDER

LEWIS SWINDELL IV, et al.,
Defendants.

This matter is before the court on the Memorandum and Recommendation ("M&R") of United States Magistrate Judge William Norton Mason FILED 1 November 2001, regarding defendant's motion to dismiss. Plaintiff filed an objection to the M&R, to which defendants responded. This matter is ripe for ruling.

After a de novo review, the court hereby ADOPTS the recommendation of Magistrate Judge Mason that defendant's motion to dismiss should be allowed as its own and, for the reasons stated therein, defendants' motion to dismiss is ALLOWED. As to Judge Mason's recommendation that the court enter a pre-filing injunction against plaintiff, the court agrees with Judge Mason's assessment that plaintiff has been a frequent litigator in this court. By the court's count, plaintiff has initiated no less than 11 actions in this district since 1980, the majority of which have been dismissed for failure to state a

claim and affirmed or dismissed on appeal.[1] While it does appear that plaintiff is embarking upon a trend of attempting to relitigate issues decided by other judges of this district or of the state court, the court is hesitant to subject plaintiff to a pre-filing injunction at this juncture. The court does, however, warn plaintiff that if he continues to engage in the filing of meritless suits in this court, particularly any against members of the judiciary or the Cannon family, he may be sanctioned with monetary penalties or be enjoined from filing suit in this court without first obtaining permission from the court. The pending motions filed by plaintiff are DENIED AS MOOT.

This action is DISMISSED.
This 13 December 2001.

/s/_____
W. EARL BRITT
Senior United States District Judge
lap/akc/acp

I certify the foregoing to be a true and correct copy of the original. David W. Daniel, Clerk United States District Court Eastern District of North Carolina.

BY/s/_____Deputy Clerk

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[1] See, e.g. Cannon v.Exum, No. 86-2153 (4th Cir. Jan. 16, 1987); Cannon v.Cannon, No. 7:96-CV-148-F (E.D.N.C. Jan. 29,1997), aff'd, 129 F.3d 1258 (4th Cir. 1997) (table); Cannonv.Cannon,No. 7:96-CV-5-F (E.D.N.C. Jan. 16,1996),aff'd, 97 F.3d 1446 (4th Cir. 1996) (table); Cannon v. Haigwood, No. 4:94-CV-110-BO E.D.N.C. Dec. 27,1994), aff'd, 59 F.3d 165 (4th Cir. June 20,1995) (table), cert. denied, 516 U.S. 1126 (1996); Cannon v Miller, No. 4:94-CV-120-BO (E.D.N.C. Dec. 16,1994), aff'd, 59 F.3d 165 (4th Cir. June 20,1995) (table), cert.denied, 516 U.S. 1126(1996).

APPENDIX-D

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
June 25, 2002
No. 02-1077
CA-01-82-7-BR

HAYWOOD ALLEN CANNON
Plaintiff - Appellant

v.

LEWIS H. SWINDELL, IV; NORMAN EDWARD WIGGINS, Individually and in his capacity as administrator; MARVIN EUGENE WIGGINS
Defendants - Appellees

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

AS the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Conner

CLERK

APPENDIX-E

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 01-2214

HAYWOOD ALLEN CANNON,
Plaintiff-appellant

Versus

RUSSELL W. DUKE, JR.; LOIS B. MEYER,
Defendants-appellees.

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Appeal from the United States District Court for the Eastern District of North Carolina , at Wilmington. James C.Fox, Senior District Judge. (CA-00-52-7-F)

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Submitted: February 21, 2002 Decided: March 4, 2002

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Before WILKINS, MOTZ, and TRAXLER, Circuit Judges.

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Affirmed by unpublished per curiam opinion.

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Haywood Allen Cannon, Appellant Pro Se. Staci Tolliver Meyer, Assistant Attorney General, Raliegh, North Carolina, for Appellees.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM:

Haywood Allen Cannon appeals the district court's orders denying relief on his 42 U.S.C. § 1983 (West Supp. 2001) complaint and denying his motion for reconsideration. We have reviewed the record and the district court's orders and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Cannon v. Duke, No. CA-00-52-7-F (E.D.N.C. Sept. 7, 2000 & Aug. 27, 2001). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX-F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:00-CV-52-F(1)

HAYWOOD A. CANNON,
Plaintiff

v. ORDER

RUSSEL W. DUKE JR. and LOUIS B. MEYER, Defendants

The plaintiff initiated this action on March 21, 2000, asserting a multitude of constitutional and civil rights claims as well as a state law claim for intentional infliction of emotional distress against the Honorable Russell W. Duke, a North Carolina Superior Court Judge, and the late Honorable Louis B. Meyer, a former North Carolina Special Superior Court Judge. The defendants have filed a motion to dismiss [7-1]. The plaintiff has responded, and the motion to dismiss is now ripe for disposition. Additionally, the plaintiff has filed a motion for temporary injunction [6-1] to which the defendants have responded, a "Motion to Further Enjoin State Actors from Acts Under Color of Law Taken Adversely Against Plaintiff" [9-1], and a motion to amend the complaint [16-1].

## I. Factual Background

The plaintiff, a frequent litigator in this court,[1] once again has come to the federal forum seeking relief from the "state judicial system [that] is poisoned against him," Complaint, p. 10, and the "substantial history of animus, prejudice, denial, and deprivation of federally protected rights from state actors and officers of the state courts." Complaint, p. 3.

As in past actions, the plaintiff seeks this court's intervention into his state court affairs. Distilled from the plaintiff's twenty-eight pages of rambling,[2] the court perceives the predicate of the plaintiff's action to be that the defendant judges unlawfully deprived him of certain real property, to which the plaintiff attempted to claim title to in state court. Specificly, the plaintiff alleges that he filed two civil actions, 97 CVS 2062 and 98 CVS 507, in state court

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[1] Cannon v. Haigwood, 4:94-CV-110-B (dismissed Dec. 20,1994; Cannon v. Miller, 4:94-CV-120-B (dismissed Dec. 20, 1994); Cannon v. State of North Carolina, 5:95-HC-675-H (dismissed May 14, 1996); Cannon v. North Carolina Dep't of Revenue, 5:99-CV-302-F (appeal of bankruptcy denied July 21, 1999); Cannon v Cannon, 7:96-CV-5 (dismissed Jan. 16, 1996); Cannon v. Cannon, 7:96-CV-139 (dismissed Sept. 10, 1996); Cannon v. Cannon, 7:96-CV-148 (dismissed Jan. 29, 1997); Cannon v. Cannon, 7:97-CV-41-F (dismissed Apr. 29, 1997).

[2] Rule 8(a) of the Federal Rules of Civil Procedure requires to contain only "a short and plain statement of the claim showing that the pleader is entitled to relief,"such that the defendant is given fair notice of what the plaintiff's claim is and the grounds upon which it rests. See Conley v. Gibson, 355 U.S. 41,47-48 (1957). Prior to future, the court requests the plaintiff to investigate the definition of both "short" and "plain."

which involved title to real property in Pitt County, North Carolina. The first action, 97 CVS 2062, was scheduled for jury trial in Pitt County Superior Court before a Judge Hockenberry on MAY 4, 1998. however, when the plaintiff arrived for his trial on May 4, 1998 he was informed that his case would be handled not in the main courtroom by Judge Hockenberry , but by the defendant, Judge Duke, whom the plaintiff alleges normally was assigned to hold court in Wayne County. The plaintiff appeared before Judge Duke, who entered an oral order dismissing 98 CVS 507, finding the action to be the same as 97 CVS 2062.

The plaintiff next asserts that on or about June 22-23, 1998, he appeared before Judge Meyer, who entered an order dismissing 97 CVS 2062. In addition to dismissing his case. Judge Meyer entered an injunction prohibiting the plaintiff from filing additional actions or pleadings without first gaining prior approval for such from a licensed attorney, Further, the plaintiff alleges that Judge Meyer entered an order requiring certain documents to be made part of the court record which plaintiff contends delayed and obstructed his right to appeal. Based on their handling of his cases, the plaintiff alleges that the defendants violated his rights under the Supremacy Clause, the First, Seventh, and Fourteenth Amendments, 42 U.S.C. §§ 1981, 1982, 1983, 1985 and 1988. He seeks compensatory and punitive damages as well as injunctive relief against the judges.

## II. Analysis

The court notes initially that to the extent that the plaintiff argues that the state court's decisions were

entered in violation of various provisions of federal law or the United States Constitution, such decisions are not reviewable by this court. As this court has previously informed the plaintiff, a federal district court may not review the correctness of state court decisions; only the Supreme Court has that power. See Rooker v. Fidelity Trust Co., 263 U.S. 413,416 (1923); Dist. Of Columbia Ct. of Appeals v. Feldman, 460 U.S. 462, 476 (1983).

The defendants have moved to dismiss the plaintiff's claim on the basis of absolute immunity. It is well established that judges have absolute immunity to suits for monetary damages for their judicial acts. See, e.g., Stump v. Sparkman, 435 U.S. 349 (1978). Such absolute immunity exists 'however erroneous the [judge's] act may have been, and however injurious in its consequences it may have proved to the plaintiff." Bradley v. Fisher, 13 Wall. 335, 347 (1871); see also Pierson v. Ray , 386 U.S. 547, 554 ("[I]mmunity applies even when the judge is accused of acting maliciously and corruptly."). The Supreme Court recently observed that "[a]lthough unfairness and injustice to a litigant may result on occasion, 'it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.' "Mirles v. Waco, 502 U.S. 9, 10 (1991) (per curiam) (quoting Bradley, 13 Wall. At 347);see also Pierson, 386 U.S. at 554 (judges should not have to "fear that unsatisfied litigants may hound [them] with litigation charging malice or corruption").

The Supreme Court has held that there are only two sets of circumstances in which immunity does not exist: "First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." Mireles, 502 U.S. at 11-12 (citations omitted).

Considering the first limitation, there is not question that Judge Duke's and Judge Meyer's respective dismissals of the plaintiff's cases as well as Judge's Meyer's entering of a pre-filing injunction and ordering that certain documents be made part of the plaintiff's record for appeal constitute actions taken in the defendants' judicial capacity. Such actions performed in the course of adjudicating the plaintiff's lawsuits are quintessential "function[s] normally performed by a judge" and are, therefore, entitled to immunity. Stump, 435 U.S. at 362.

As to the second limitation, the Supreme Court has instructed that a judge "will be subject to liability only when he has acted in the 'clear absence of jurisdiction,' "Stump, 435 U.S. at 356-57 (quoting Bradley, 13 Wall. at 351). Immunity is not granted if "there is clearly no jurisdiction over the subject-matter...[and] the want of jurisdiction is known to the judge." King v. Meyers, 973 F.2d 354, 357 (4th Cir. 1992) (quoting Stump, 435 U.S. at 356 n.6 (quoting Bradley v. Wall. at 351-52)). For this reason, the question is "whether at the time [the judge] took the challenged action he had jurisdiction over the subject matter before him." And in answering that question, 'the scope of the judge's jurisdiction must be construed broadly.'" Id. (quoting Stump, 435 U.S. at 356; see also Ireland v. Tunis, 113 F.3d 1435,1441 (6th

Cir. 1997) ("If the matter upon which the judge acts is clearly outside the subject matter jurisdiction of the court over which the judge presides, the act is done in the clear absence of all jurisdiction.)".

In North Carolina, '[t]he superior courts have 'general jurisdiction' of all justiciable matters of a civil nature whose jurisdiction is not specificly placed elsewhere." Hodge v. North Carolina Dep't of Transportation, 528 S.E.2d 22, 25 (N.C. App. 2000) (citing N.C. Gen. Stat. § 7A-240). Therefore, in presiding over the plaintiff's actions involving real property disputes, the defendants were acting within the realm of their subject matter jurisdiction as superior court judges. Because Judge Duke and Meyer were acting in a judicial capacity and their actions were not taken in the clear absence of jurisdiction, they are absolutely immune from the plaintiff's claims for money damages.

In addition to a legal remedy, the plaintiff also requests injunctive relief. Namely, the plaintiff seeks to enjoin Judge Duke from entering any orders or presiding in any matter, civil or criminal, of which the plaintiff is either a party or defendant.[3] Although the Supreme Court held in Pulliam v. Allen, 466 U.S. 522, 541-42 (1984), that judicial immunity does not bar prospective injunctive relief against a judicial officer, in 1996 Congress passed the Federal Courts Improvement Act ("FCIA") which legislatively reversed Pulliam in several important aspects. Most significantly, FCIA amended 42 U.S.C. § to state that "in any action brought against a judicial officer for

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[3] The plaintiff initially sought injunctive relief against Judge Meyer as well as Judge Duke. However, upon learning that Judge Meyer is deceased, the plaintiff now seeks injunctive relief against only Judge Duke.

an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." Federal Courts Improvement Act of 1996, § 309 (c), Pub. L. No. 104-317, 110 Stat. 3847, 3853 (1996) (amending 42 U.S.C. § 1983). The plaintiff here neither alleges that Judge Duke has violated a declaratory decree nor that declaratory relief is unavailable. Thus, those claims of the plaintiff which seek injunctive relief are DISMISSED.

The plaintiff's claims asserted under 42 U.S.C. § § 1981 and 1982 are frivolous in that the plaintiff does not allege that he has been discriminated against on the basis of race. See Runyon v. McCrary, 427 U.S. 160 (1976) (§ 1981) forbids both official and private racially discriminatory interference with property rights);Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (§ 1982) prohibits racial discrimination in the making and enforcing of private contracts). Therefore, these claims are DISMISSED.

The plaintiff also alleges that the defendants conspired with others to deprive him of equal protection of the laws in violation of 42 U.S.C. § 1985(3), by discriminating against him on the basis of his religious affiliation. Specifically, he alleges that Judge Duke conspired with lawyers and other individuals to cover up the larceny of a safe belonging to the plaintiff's father and a fraudulent conveyance involving a tract of long [land] alleging belonging to the plaintiff. He states that he is a Jehovah's Witnesses and asks the court to take judicial notice of the "well known and widespread animus against this particular group." Complaint, p. 6; He alleges that Judge Duke informed him that he

was in Pitt County for a national day of prayer and asked the plaintiff what his religion was. Further, when he appeared before Judge Meyer, the plaintiff alleges that opposing counsel informed Judge Meyer that the plaintiff was a Jehovah's Witness. Additionally, the plaintiff alleges that "[o]ne of the persons who hoped to benefit from the sale of this real property was present that day and is a preacher of some denomination. It is therefore alleged that there is animus of a religious nature towards plaintiff." Id.

In order to establish a cause of action for "conspiracy to deny equal protection of the laws" under § 1985(3), a plaintiff must prove: "(1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminately animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy." Simmons v. Poe, 47 F.3d 1370, 1376 (4th Cir. 1995). In order to survive a motion to dismiss, a plaintiff alleging a conspiracy claim under § 1985(3) must plead specific facts in a nonconclussory fashion showing participation in a joint plan of action. See Gooden v. Howard County, 954 F.2d 960, 969 (4th Cir. 1992) (en banc).

That Judge Duke allegedly made a comment to the plaintiff about a "national day of prayer" and inquired as to the plaintiff"s religious affiliation offers no proof that Judge Duke conspired with others to deprive the plaintiff of equal protection of the laws. Likewise, allegations that a lawyer mentioned the plaintiff's religious affiliation in court

or that an unnamed preacher was a member a denomination different from the plaintiff offer no proof that Judge Meyer conspired against the plaintiff's rights. Finally, allegations that Judge Duke conspired to cover up a larceny or fraudulent conveyance are conclussory, unsupported, and completely unfounded. The plaintiff's allegations are insufficient to state a cause of action under § 1985(3) and such claim, thus , must be DISMISSED.

In the absence of any remaining federal claims, pursuant to 28 U.S.C. § 1367(c)(3), the court declines to exercise supplemental jurisdiction over the plaintiff's pendent state law claim, and ORDERS this claim DISMISSED without prejudice

## III. CONCLUSION

In accordance with the foregoing, the defendant's motion to dismiss [7-1] is ALLOWED and this action is DISMISSED in its entirety. The plaintiff's motion to amend [16-1] is DENIED. The plaintiff's motion to amend [16-1] is DENIED as futile.

SO ORDERED.

This the 7th day of September, 2000.

/s/_____
James C. Fox
United States District Judge

I certify the foregoing to be a true and correct
Copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina
By_____
Deputy Clerk

APPENDIX-G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:00-CV-52-F(1)

FILED
AUG. 27 2001
DAVID W. DANIEL, CLERK
U.S. DISTRICT COURT
E. DIST. NO. CAR.

HAYWOOD A. CANNON,
Plaintiff,

v.

RUSSELL W. DUKE JR. and LOUIS B. MEYER,
Defendants.

This matter is before the court upon motion by the plaintiff for reconsideration of the court's September 7, 2000 Order, which dismissed the plaintiff's action. The plaintiff also has submitted two supplemental memoranda offering further argument in support of his motion. The defendants have not responded to this motion; the matter is now ripe for disposition.

Upon review of the materials submitted by the plaintiff and the record in this case, the court is confident that its order of dismissal was correct and in accordance with law.

Accordingly, the plaintiff's motion to reconsider hereby DENIED.

SO ORDERED.

This the 27th day of August, 2001.

/s/_____

cc

I certify the foregoing to be a true and Correct copy of the original. David W. Daniel, Clerk United States District Court E.D.N.C.

/s/_____
Deputy Clerk

James C. Fox
Senior United States District Judge

dd

APPENDIX-H

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 22, 2002
No. 01-2214
CA-00-52-7-F

HAYWOOD ALLEN CANNON
Plaintiff-appellant

v.

RUSSELL W. DUKE, JR.; LOIS B. MEYER
Defendant-appellees

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On Petition for Rehearing and Rehearing En Banc

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The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,
/s/ Patricia S. Connor
CLERK